

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

BARBARA SERROS

PLAINTIFF

VS.

CIVIL ACTION NO. 2:01CV-152-D-B

COLUMBIA UNIVERSAL LIFE INSURANCE
COMPANY AND CHRIS COLE

DEFENDANTS

OPINION

Presently before the court is the Plaintiff's motion to remand this matter to the Circuit Court of Desoto County, Mississippi, and Defendant Chris Cole's motion to dismiss based upon fraudulent joinder. Upon due consideration, the court finds that the Plaintiff's motion to remand should be denied and Defendant Cole's motion to dismiss should be granted.

A. Factual Background

The Plaintiff, Barbara Serros, is the widow of Antonio Serros, who died on April 5, 1999. On or about October 12, 1998, Defendant Chris Cole, an agent for Columbia Universal Life Insurance Company, visited Antonio and Barbara Serros at their home to present information on Columbia's life insurance policies. Antonio decided to purchase a life insurance policy. Cole asked Antonio several questions concerning his medical history and filled out the paperwork for the policy. While at their home, Cole also called a representative of Columbia who interviewed Plaintiff and Antonio. Columbia Universal issued a policy of life insurance to Antonio Serros on or about October 20, 1998. Plaintiff was the named beneficiary on the policy.

After Antonio's death, Plaintiff contacted Cole. As a result, Columbia sent Plaintiff the necessary forms and advised her to complete them and return them with a copy of Antonio's death certificate. Columbia ultimately denied payment on the grounds that Antonio misrepresented his health history.

Serros filed this suit in the Circuit Court of Desoto County, Mississippi, on June 1, 2001,

alleging various causes of action against Columbia, as well as Cole, including fraud, breach of contract, wrongful denial of insurance payments, and that Cole breached his duty of care in the procurement of the insurance coverage. The Defendants removed the action to this court on or about July 6, 2001, pursuant to 28 U.S.C. §§ 1332 and 1441, on the basis of diversity jurisdiction, alleging that Cole was fraudulently joined. Thereafter, the Plaintiff motioned the court to remand this matter to state court.

B. Standard for Review

The Judiciary Act of 1789 provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Original federal jurisdiction exists "where the matter in controversy exceeds the sum or value of \$75,000.00, exclusive of interest and costs, and is between ... citizens of different states ..." 28 U.S.C. § 1332(a); Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd., 99 F.3d 746, 751 (5th Cir. 1996).

Here, the Plaintiff and one of the Defendants, Cole, are residents of Mississippi. This fact, however, will not destroy federal diversity jurisdiction if Plaintiff fraudulently joined Cole in order to defeat diversity. Rodriguez v. Sabatino, 120 F.3d 589, 591 (5th Cir. 1997). Defendants assert that Cole was fraudulently joined.

The party alleging fraudulent joinder bears the burden of persuasion and that burden is quite stringent. See Hart v. Bayer Corp., 199 F.3d 239, 246 (5th Cir. 2000) ("The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one."). In order to prove that a non-diverse party has been fraudulently joined by a plaintiff hoping to defeat diversity, the removing party must demonstrate either "outright fraud in the plaintiff's recitation of jurisdictional facts," or that there is "absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court." Hart, 199 F.3d at 246.

The Defendants here do not allege outright fraud, so the court must determine whether there is

absolutely no possibility that Plaintiff will be able to establish a cause of action against Cole in state court. In making this determination, the court must evaluate all of the factual allegations in the Plaintiff's state court pleadings in the light most favorable to her. Further, the court must examine relevant state law and resolve any uncertainties in favor of Plaintiff. Hart, 199 F.3d at 246. In evaluating a claim of fraudulent joinder, the court does not focus on whether Plaintiff will prevail on the merits of her claim. Instead, the court determines whether there is a possibility that Plaintiff will be able to state a claim against Cole. Rodriguez, 120 F.3d at 591.

C. Discussion

1. The Plaintiff's Motion to Remand

Whether a case states a cognizable claim against a defendant is determined by reference to the allegations made in the original pleadings, although the court may "pierce" those pleadings in making its determination. B, Inc., v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981); Wheeler v. Frito Lay, Inc., 743 F.Supp. 483, 485 (S.D. Miss.1990). In the case at bar, Plaintiff alleges, *inter alia*, that Cole fraudulently induced Antonio to purchase the policy and that Cole was grossly negligent in the course of selling and procuring the insurance policy.

Plaintiff states in her complaint that she and Antonio truthfully answered all questions asked of them and provided accurate information concerning their prior medical histories. Specifically, question 21 reads as follows:

During the past 24 months has the Proposed Insured had ... liver disease,
kidney failure, emphysema or chronic obstructive pulmonary disease (C.O.P.D.)?

Plaintiff states that Antonio had not suffered from any of the illnesses listed on line 21 and that Cole, therefore, checked the "No" box in response to the question. Plaintiff further states in the complaint that Columbia and its agents and employees are attempting "to deny Plaintiff's claim on the basis that Antonio Serros misrepresented his health history on the application when, in fact, Antonio Serros provided agent Cole with truthful response [sic] with which Agent Cole filled out the form." See Complaint at ¶27.

After Antonio's death, Plaintiff contacted Cole. As a result, Columbia sent Plaintiff the necessary forms and advised her to complete them and return them with a copy of Antonio's death certificate. Columbia ultimately denied payment on the grounds that Antonio misrepresented his health history. Specifically, Columbia wrote to Plaintiff and stated that they obtained medical information from Baptist Memorial Hospital in Desoto County that indicated that during the 24 month period prior to the application Antonio had "kidney failure / renal insufficiency due to vascular disease and hypertension." Columbia further advised Plaintiff that Antonio's "policy of insurance number 088903 is hereby considered null and void and is hereby rescinded."

In her complaint, Plaintiff asserts that "Cole was acting within the scope of his authority as an agent for the defendant Columbia Universal." See Complaint at ¶8. Under Mississippi law, the general rule is that in circumstances where a defendant acts as an agent for a known principal, the defendant-agent incurs no liability for a breach of duty or contract committed by the principal. McFarland v. Utica Fire Ins. Co., 814 F. Supp. 518, 521 (S.D. Miss. 1992). Further, such an agent may not be held directly liable under an insurance contract if he was not a party to the insurance contract itself, since he has no duty arising from the policy to provide coverage. Ironworks Unlimited v. Purvis, 798 F. Supp. 1261, 1266 (S.D. Miss. 1992).

The court, however, recognizes that under Mississippi law, insurance agents, while not liable for ordinary negligence in carrying out duties on behalf of the insurers, can incur independent liability when their conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured. Bass v. California Life Insurance Co., 581 So. 2d 1087, 1090 (Miss.1991). In Bass, the Mississippi Supreme Court held that an administrator of an insurance plan could be held liable for a bad faith failure to pay claims under the insurance policy. Bass, 581 So. 2d at 1090. In that case, the insured sued for bad faith denial of an insurance claim against the insurer and the plan administrator who had the authority to pay certain claims with no prior approval from the insurer. Id. Unlike the case *sub judice*, the decision to deny claims was conferred to someone other than the insurance company. Thus, such a

power would create liability on the part of an agent of the company as well as the insurer itself.

However, such is not the case before this court. Neither the complaint nor any of the other pleadings even remotely suggests that Cole had any authority or role in the decision to deny Plaintiff's claim. Cole was not a party to the contract nor the party to look to for benefits.

Plaintiff further states in the complaint that Defendant Cole breached certain duties owed to the insured, including "the duty to use reasonable care and to act in good faith and diligence in the procurement of the insurance coverage requested by Antonio Serros. Defendant Cole breached these duties because the policy of insurance was not honored by the Defendant, Columbia Universal." See Complaint at ¶29. Plaintiff cites the case of Lovett v. Bradford, 676 So. 2d 893 (Miss. 1996) for support. Plaintiff states that :

Cole, like the agent in Lovett, had a duty to provide the level of skill in procuring the policy of insurance reasonably expected of one in his profession. That level of skill would, Plaintiff contends, include the ability to obtain health history information accurately and complete the application in a manner that would not result in the policy being canceled when a claim is made.

Plaintiff's Reply Brief on Motion to Remand p. 5.

In Lovett, the Plaintiff filed suit against his insurance agent (Lovett), alleging that his agent negligently completed the application for fire insurance on his mobile home. Lovett, 676 So. 2d at 894. Specifically, one of the questions on the application was whether Plaintiff had sustained a fire loss within the last five years. Id. The Plaintiff claimed he told Lovett that he had a fire, but that he wasn't sure if it was more than five years ago or not. Id. Actually, the Plaintiff received over \$41,000 in fire insurance proceeds just 4 ½ years previously. Id. The Mississippi Supreme Court affirmed the trial court's judgment on the jury verdict against the agent and stated there was "substantial evidence that Bradford disclosed the fire to Lovett." Id. at 896.

In the present case, Plaintiff admits that Cole correctly marked the "No" box in response to question 21. Plaintiff still maintains "that the response of Antonio Serros to Question 21 that he had not suffered from any of the named illnesses was true" and "reiterates that Cole was provided accurate

information regarding Mr. Serros' health history." See Complaint at ¶ 27; Plaintiff's Reply Brief on Motion to Remand p. 4. Had Antonio informed Cole that he in fact had kidney problems in the past and Cole had assured Antonio that he would be covered nevertheless, then the court would be confronted with a different issue. But that is not the case here. Here Cole procured the policy for Antonio based on the information Antonio and Plaintiff gave to Cole (and to Columbia on the phone), and when Plaintiff contacted Cole and informed him that Antonio died, Cole communicated with Columbia, who in turn informed Plaintiff about the procedure for making a claim.

Plaintiff also alleges that "Cole's misrepresentations to Mr. Serros about the nature and scope of his coverage and his failure to procure the coverage requested, constitutes fraudulent misrepresentations and concealment about the insurance coverage Mr. Serros was purchasing, and fraudulent inducement in the sale of the policy." It appears that Plaintiff's argument is that Cole knew or should have known that Columbia often denied coverage based upon misrepresentations of health history in the application.¹

As mentioned above, the authority Plaintiff relies on is misplaced, as those cases involve agents who stated the potential insured would be covered, *even when the insured disclosed past medical problems*. See American Income Life Ins. Co. v. Hollins, No. 1999-CA-00528-SCT, 2001 WL 695516 at *6 (Miss. June 21, 2001) ("Hollins's claim for fraud is founded on the statement made to her by [agent] Jones at the time of completing her policy application. She and three other witnesses testified that Hollins described her history of female problems to Jones, who responded that as long as she had not undergone surgery for these problems, they would be covered by the policy.") Any assurances that Cole gave in the present case were based on the information from Plaintiff and Antonio, which Plaintiff still asserts is true, that Antonio had not suffered from any kidney problems in the prior 24 months.

In sum, it is axiomatic that where the plaintiff's complaint is devoid of any factual allegations

¹Plaintiff states that every single death benefit claim resisted by Columbia in 1999 was based upon "Misrepresented health history on application" and according to the Company's regulatory filing, those resisted claims totaled over a million dollars for that year.

suggesting a legally cognizable basis of recovery against a particular defendant, there can be no ground for concluding that a claim has been stated. Addison v. Allstate Ins. Co., 58 F. Supp. 2d 729, 732 (S.D. Miss. 1999). Failure to specify a sufficient factual basis for recovery against a nondiverse party, therefore, constitutes a fraudulent joinder of that party. Addison, 58 F. Supp. 2d at 732. As was the case in Ironworks, even "when construed in the light most favorable to Plaintiff, there can be no doubt that Plaintiff's claim relates solely to the failure to pay the insurance claim submitted by Plaintiff to Defendant [Insurance Company]." Ironworks Unlimited, 798 F. Supp. at 1265. Therefore, the court finds that the Plaintiff has no possibility of establishing a cause of action against Cole in state court, and that Cole was fraudulently joined to defeat diversity.

2. Cole's Motion to Dismiss

Having determined that Cole was fraudulently joined, the court has little trouble also concluding that the claims against him should be dismissed pursuant to Rule 12(b)(6). The standards to be applied for a fraudulent joinder claim and for dismissal for failure to state a claim are virtually identical. Addison, 58 F. Supp. 2d at 733-34. A Rule 12(b)(6) motion should be granted if the court finds that a plaintiff can prove no set of facts in support of his claim that would entitle him to the relief he seeks. Rubinstein v. Collins, 20 F.3d 160, 166 (5th Cir. 1994). In other words, dismissal is proper under Rule 12(b)(6) if the complaint lacks an allegation regarding a required element necessary to obtain relief. See Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995).

In addition, as is the case with a fraudulent joinder claim, to avoid dismissal for failure to state a claim, a plaintiff "must plead specific facts, not mere conclusory allegations." Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992). The court will not accept as true any conclusory allegations or unwarranted deductions of fact. See Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

As noted above, Plaintiff has alleged, in vague and conclusory fashion, and without legal

support, that Cole was grossly negligent in his selling and procuring the policy and that he fraudulently induced Antonio Serros to purchase the life insurance policy, because the claim was ultimately not paid. Plaintiff has failed, however, to plead any facts that will support recovery for Cole's alleged negligence or fraud. As a result, the Plaintiff's conclusory allegations, unsupported by legally sufficient factual assertions, will not withstand Cole's motion to dismiss. The court finds, therefore, that Cole's motion to dismiss should be granted, and the claims against him are dismissed.

D. Conclusion

In sum, this court concludes that after examining relevant state law, Cole has met the burden of proof to show that he was fraudulently joined. There is no possibility that the Plaintiff will be able to establish a cause of action against the in-state Defendant, Cole, in state court. Therefore, this court denies Plaintiff's motion to remand and dismisses all claims against Cole. Since diversity exists between the remaining parties, this court retains jurisdiction to hear their dispute.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of October 2001.

Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BARBARA SERROS

PLAINTIFF

VS.

CIVIL ACTION NO. 2:01CV-152-D-B

COLUMBIA UNIVERSAL LIFE INSURANCE
COMPANY AND CHRIS COLE

DEFENDANTS

ORDER

Pursuant to an opinion issued this day, it is hereby ORDERED that

- (1) the Plaintiff's motion to remand (docket entry 6) is DENIED;
- (2) the Defendant Chris Cole's motion to dismiss the claims against him (docket entry 10) is GRANTED; and the Plaintiff's claims against Defendant Cole are DISMISSED; and
- (3) this cause of action remains in the jurisdiction of the United States District Court for the Northern District of Mississippi, with Columbia Universal Life Insurance Co. as the sole remaining Defendant.

SO ORDERED, this the _____ day of October 2001.

Chief Judge